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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GOLTHA GREEN,

Plaintiff and Appellant,

v.

54TH STREET
INVESTMENTS, LLC,

Defendant and
Respondent.

B281019

(Los Angeles County
Super. Ct. No. BC548724)

APPEAL from judgment of the Superior Court of Los Angeles County, Lawrence H. Cho, Judge. Affirmed.

Law Office of Freddie Fletcher and Freddie Fletcher,
for Plaintiff and Appellant.

Hill, Farrer & Burrill, G. Cresswell Templeton, III,
Jesse Molina, Jeffrey B. Bell, for Defendant and Respondent.

Plaintiff and appellant Golphtha Green appeals from a judgment of dismissal following an order sustaining the demurrer of defendant and respondent 54th Street Investments, LLC (Investment Company), without leave to amend, in this real property action. On appeal, Green contends the five-year statute of limitations for ejectment applies to his cause of action against the Investment Company, and the trial court abused its discretion in denying leave to reallege causes of action for ejectment and wrongful possession of property. We conclude the gravamen of Green's sole cause of action against the Investment Company is fraud, which is subject to a three-year statute of limitations. The trial court did not abuse its discretion in dismissing the lawsuit against the Investment Company with prejudice because the proposed causes of action implicate the same primary rights and are subject to the same three-year statute of limitations. The judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the relevant facts as alleged in the operative complaint, together with matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

Green owned several properties, including an apartment building located on 54th Street in Los Angeles. He had six commercial loans secured by deeds of trust on his four properties, which were held by JPMorgan Chase Bank (Bank) as the successor to Washington Mutual Bank. In July 2010, the Bank issued delinquency notices for five of the loans, stating that Green was in default. Repayment of all the loans was accelerated for failure to make payment. On December 6, 2010, the trustee recorded notices of default on behalf of the Bank for each of Green's six loans, initiating non-judicial foreclosures.

On December 27 and 28, 2010, the Bank filed judicial foreclosure proceedings against Green under four civil case numbers, one for each of Green's properties. Following lengthy receivership and bankruptcy proceedings (see *Green v. Sweeney* (Dec. 17, 2018, B283215 [nonpub. opn.]), the trustee published and posted a notice of sale of the properties to be held at auction on May 31, 2011. The trustee's sale was postponed to June 15, 2011. On June 16, 2011, the trustee assigned six trustee deeds to CRP Properties, Inc. (CRP) as the highest bidder at the sale. CRP was not the noticed foreclosing beneficiary named in the

notices of default and sale. The Bank also executed assignments of the six notes and deeds of trust to CRP.

On September 16, 2011, CRP conveyed title of the 54th Street property to Wilshire Fund 54th Street LLC (Wilshire Fund). Wilshire Fund conveyed title of the property to the Investment Company on February 9, 2012.

Green filed this action on June 16, 2014.¹ Green filed a first amended complaint on February 9, 2015. The Investment Company filed a demurrer to the first amended complaint and, while the demurrer was pending, Green voluntarily dismissed the Investment Company without prejudice.

Following the first dismissal, Green named the Investment Company as a defendant for the second time in a second amended complaint filed August 5, 2015. Green then dismissed the Investment Company without prejudice for a second time on October 21, 2015.

Operative Complaint

Green filed a third amended complaint followed by the operative complaint, an amended third amended complaint,

¹ Green's action named more than two dozen defendants in addition to the Investment Company, including the Bank, CRP, Wilshire Fund, and other persons and entities. None of the other defendants are parties to this appeal.

on June 9, 2016. The operative complaint alleged a single cause of action against the Investment Company for “Quiet Title/Cancellation of Instruments.”² The operative complaint alleges: Green was not in default at the time of the non-judicial foreclosure because he timely tendered payment on the loans, which was comprised of a check and setoff against the Bank’s debt to Green for improperly procuring forced placed insurance. Despite his payments, the Bank “commenced a scheme to force Green to bring all of his loans current” by blocking payments, refusing Green’s setoff without stating a reason, demanding that Green pay the amount refused plus the next monthly installments early, and accelerating payments on all amounts owed in the loans in one lump sum. The Bank retaliated against Green by instructing the trustee to record notices of default and elections to sell the properties, which the Bank used to refuse Green’s attempts to reinstate his loans. In order to procure the appointment of a receiver to manage Green’s properties and collect the rents therefrom, the Bank falsely alleged in the judicial foreclosure proceedings that Green had defaulted, when in fact the Bank had prevented Green from making, and refused to accept his payments. The appointment of the receiver deprived Green of his income, which consisted of the rents from the properties. The Bank wrongfully refused Green’s requests to reinstate his loans

² Several other defendants are named in this cause of action along with the Investment Company.

and apply the rents collected by the receiver to pay the loan amounts. The trustee sale conveying the properties to CRP was “false in that CRP was not a beneficiary at all until assignments of Green’s notes and deeds of trust from [the Bank] to CRP were executed.” The trustee knew CRP was not a beneficiary at the time of sale. The sale was “void as unauthorized” and the trustee’s deeds were “void.” Defendants acted with oppression, fraud, and malice.

On April 27, 2016, Green filed a motion for leave to amend the complaint to divide the cause of action against the Investment Company into three causes of action: quiet title, ejectment, and a cause of action to remove a cloud on title.

Demurrer, Opposition, and Trial Court Ruling

The Investment Company filed a demurrer on the grounds that the cause of action was barred by the three-year statute of limitations for fraud or the four-year statute of limitations for breach of contract. The statute of limitations began to run from the June 15, 2011 foreclosure sale. The operative complaint naming the Investment Company as a defendant, filed more than four years later on August 5, 2015, was beyond the statute of limitations.

Green opposed the demurrer by arguing a five-year statute of limitations applied because the facts alleged in the complaint stated a cause of action for ejectment. In other sections of the opposition, Green argued that a four-year

statute of limitations applies to breach of a deed of trust, breach of a written contract, and actions to cancel a void deed.

The trial court sustained the demurrer without leave to amend, finding that Green's claim against the Investment Company was barred by a three- or four-year statute of limitations. The trial court found the cause of action accrued when the property was sold at the non-judicial foreclosure sale on June 15, 2011. After dismissing the Investment Company from prior complaints, Green did not file this action naming the Investment Company until August 5, 2015. The trial court stated, "[w]hether the statute of limitations is three years or four years, plaintiff's claim is barred. . . . Given that plaintiff's action is barred by the statute of limitations, there is no likelihood plaintiff could amend the complaint to state a cause of action."

On December 22, 2016, the trial court entered judgment. Green filed a timely notice of appeal.

DISCUSSION

Standard of Review

We apply a de novo standard of review on appeal from an order sustaining a demurrer. "[W]e exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.] First, we give the complaint a reasonable interpretation, reading it as a

whole and its parts in their context.” (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439 (*Stearn*).) “We accept as true all properly pleaded material factual allegations of the complaint and other relevant matters that are properly the subject of judicial notice, and we liberally construe all factual allegations of the complaint with a view to substantial justice between the parties.” (*Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.* (2012) 203 Cal.App.4th 913, 919.) “Then we determine whether the complaint states facts sufficient to constitute a cause of action.” (*Stearn, supra*, at p. 439.) “We do not, however, assume the truth of contentions, deductions, or conclusions of law.” (*Id.* at p. 440.)

When a demurrer is sustained without leave to amend, we decide “whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

Statute of Limitations

Plaintiff contends the five-year statute of limitations for ejectment applies in this case because he alleged facts sufficient to state claims for ejectment and wrongful possession of property. We disagree.

“Under the statute of limitations, a plaintiff must bring a cause of action within the limitations period applicable

thereto after accrual of the cause of action.” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397; see Code Civ. Proc., § 312.)³

In this matter, the parties dispute which of several statutes of limitation apply to Green’s cause of action against the Investment Company. Green contends that certain five-year statutes govern. A plaintiff must commence an action within five years of being seized or dispossessed of real property. (§ 318.) A five-year statute of limitations also applies to actions to recover mesne profits of real property. (§ 336, subd. (a).) The Investment Company argues that Green’s claims are governed by shorter statutes. A plaintiff must commence an action to recover title or possession of property within three years if the action for relief is premised on fraud or mistake. (§ 338, subd. (d).) Actions for relief not otherwise provided for by statute must be commenced within four years after the cause of action has accrued. (§ 343.)

In selecting among various statutes of limitations, we are mindful that “a specific limitations provision prevails over a more general provision.” (*Creditors Collection Service v. Castaldi* (1995) 38 Cal.App.4th 1039, 1044 (*Castaldi*).) Moreover, “[t]o determine [which] statute of limitations applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the “gravamen” of the

³ Subsequent references to statutes are to the Code of Civil Procedure unless otherwise indicated.

cause of action. [Citations.] “[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.” [Citation.]’ (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23, citing *Leeper v. Beltrami* (1959) 53 Cal.2d 195, and *Maguire v. Hibernia S. & L. Soc.* (1944) 23 Cal.2d 719, 733; see also Note, *Developments in the Law—Statutes of Limitations* (1950) 63 Harv. L. Rev. 1177, 1192, 1195-1198.)” (*Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 874–875 (*Marin Healthcare*)). “The gravamen of an action depends on the nature of the right sued upon or the principal purpose of the action.” (*Bank of New York Mellon v. Citibank, N.A.* (2017) 8 Cal.App.5th 935, 943 (*Bank of New York Mellon*)). “Put another way, ‘[w]hat is significant for statute of limitations purposes is the primary interest invaded by defendant’s wrongful conduct. [Citation.]’ [Citations.]” (*Marin Healthcare, supra*, at p. 875.)

“‘The statute of limitations that applies to an action is governed by the gravamen of the complaint, not the cause of action pled.’ [Citation.] It is the substance of the action, rather than the form of the pleading or the labels employed, that governs. [Citation.]” (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 967–968.) Accordingly, “the statute of limitations on a quiet title action is determined with reference to the underlying theory of relief.” (*Bank of New York Mellon, supra*, 8 Cal.App.5th at p. 944.)

Either the three-year limitations period under section 338, subdivision (d), or the four-year limitations period under section 343 applies to an action to cancel a deed as void, depending on the theory alleged. (See *Walters v. Boosinger* (2016) 2 Cal.App.5th 421, 433, fn. 16; *Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319, 1326.) Whereas a suit to cancel a void instrument is generally governed by section 343, “[i]t is immediately clear that a three-year limitations period applies to any cause of action, however designated, founded upon a fraudulent conspiracy Section 338, subdivision (d) provides for a three-year statute for ‘[a]n action for relief on the ground of fraud or mistake.’ This statute applies to any action for conspiracy based upon fraud. [Citation.] Moreover, the section is comprehensive and applies ‘if fraud or mistake is the basis of the legal injury (the “ground” of the action) . . . regardless of whether the complaint seeks legal or equitable relief or pleads a cause of action in tort or contract.’ [Citations.] Thus, the three-year statute applies to any equitable action . . . to cancel an instrument and impose a constructive trust based on fraud. [Citation.]” (*Hatch v. Collins* (1990) 225 Cal.App.3d 1104, 1110.)

The plaintiffs in *Leeper v. Beltrami* (1959) 53 Cal.2d 195 (*Leeper*), contended that the five-year statute of limitations under section 318 applied to an action to set aside or cancel a deed to a defendant who was aware of fraudulent conduct by a third party. (*Id.* at pp. 211–212.) The plaintiffs alleged that the co-defendants plotted to have

the plaintiffs pay a false debt to foreclose their properties even though nothing was due on a preexisting note or mortgage securing the notes. (*Id.* at p. 201.) The plaintiffs could not sell their property because the co-defendants refused to withdraw their false claim from title on the property. (*Id.* at p. 202.) Fearful of losing the properties, the plaintiffs were compelled to sell the property for a substantially lower price to the defendant, who knew the co-defendants were extorting the plaintiffs. (*Id.* at pp. 202, 205.)

In determining what limitations period applied, the Supreme Court disagreed with the plaintiffs that they merely sought to recover real property such that the five-year period under section 318 applied. (*Leeper, supra*, 53 Cal.2d at p. 212.) The plaintiffs’ “right to quiet title depends on their right to get out of the contract of conveyance. That right depends upon whether . . . the plaintiffs had a right to rescind.” (*Id.* at p. 214.) Should the right to rescind hinge on a showing of fraud or duress, the three-year statute of limitations under section 388 applied. (*Id.* at pp. 208, 215.) “The same rule is applicable if the action be considered as one for cancellation of a deed.” (*Id.* at p. 215.)

In this case, Green’s right to cancel the trustee deed is premised on whether the Bank, trustee, and beneficiary to the trustee sale engaged in fraud. Green alleged the Bank engaged in fraudulent conduct by falsely contending his payments were in default, blocking payments, refusing a setoff, demanding that Green pay amounts owing on

delinquent debts and future installments, and accelerating payments. Green alleged the Bank engaged in this fraudulent conduct to force the non-judicial foreclosure sale, and the Bank would not allow him to reinstate his loans. Green further contends the trustee and beneficiary, CRP, engaged in fraudulent conduct by conveying the 54th Street property knowing that CRP was not a beneficiary on the June 16, 2011 trustee deed. Based upon this fraudulent conduct, Green contends the deed of trust conveying title to CRP and subsequently the Investment Company was “void” such that the deeds at issue should be cancelled. Having independently reviewed the operative complaint, we conclude that the gravamen of the “Quiet Title/Cancellation of Instruments” cause of action against the Investment Company is premised on fraud, and that the three-year statute of limitations under section 338, subdivision (d), applies. This conclusion is also consistent with the maxim that a specific limitations provision prevails over a more general provision (*Castaldi, supra*, 38 Cal.App.4th at p. 1044.)⁴

It is undisputed that the cause of action against the Investment Company accrued on June 16, 2011 when the trustee deeded the property to CRP. Green voluntarily

⁴ Even under the four-year statute of limitations for actions based on a written deed of trust, the statute of limitations ran before Green filed the instant action against the Investment Company.

dismissed the Investment Company from prior complaints in this action. By the time Green filed the operative complaint on August 5, 2015, the statute of limitations had run on his cause of action against the Investment Company. “[A] party’s voluntary dismissal without prejudice does not come equipped by law with an automatic tolling or waiver of all relevant limitations periods; instead, such a dismissal includes the very real risk that an applicable statute of limitations will run before the party is in a position to renew the dismissed cause of action.” (*Hill v. City of Clovis* (1998) 63 Cal.App.4th 434, 445; accord, *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 359–360.)

Green contends the five-year statute of limitations applies because the operative complaint alleges facts constituting causes of action for ejectment (*Haggin v. Kelly* (1902) 136 Cal. 481, 483), and wrongful occupation of property (Civ. Code, § 3334, subd. (a)). These causes of action do not determine the applicable statute of limitations. (*Bank of New York Mellon, supra*, 8 Cal.App.5th at p. 944.) Rather, the causes of action implicate Green’s primary interest in and right to possess the 54th Street property, which he contends was invaded by fraudulent conduct by the Bank, trustee, and initial beneficiary. Regardless of whether Green characterizes his claims as ones for ejectment or wrongful occupation, they are also subject to the three-year statute of limitations.

Based on the foregoing, the court did not err in sustaining the demurrer to the amended third amended

complaint, nor did the court abuse its discretion in refusing Green leave to amend to reallege ejectment and wrongful occupation of property causes of action under a different heading. (*Placer Foreclosure, Inc. v. Aflalo* (2018) 23 Cal.App.5th 1109, 1117 [no abuse of discretion established where plaintiff did not provide allegations or facts that would cure the defect in the complaint]; *Blank, supra*, 39 Cal.3d at p. 318.)⁵

⁵ Investment Company contends this action may be moot because Green is currently pursuing damages against the Bank, which would preclude taking back possession of the property. In light of our decision, we need not address this argument.

DISPOSITION

The judgment is affirmed. Defendant and respondent 54th Street Investments, LLC is awarded costs on appeal.

MOOR, J.

WE CONCUR:

RUBIN, P. J.

BAKER, J.